United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1172

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1172

UNITED STATES OF AMERICA,
Appellee,

—v.—

BERNARD TURNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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(Corrected Copy)

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Preliminary Statement

Bernard Turner appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on February 18, 1976, after a one-day jury trial before the Honorable Dudley B. Bonsal, United States District Judge.

Indictment 75 Cr. 1253, filed December 23, 1975, charged Bernard Turner in one count with attempted bank robbery in violation of Title 18, United States Code, Section 2113(a).

Trial commenced against Turner on February 18, 1976, and concluded that same day, when he was found guilty as charged. On April 5, 1976, Judge Bonsal sentenced Turner to a term of eight years imprisonment.

Statement of Facts

A. The Government's Case

On December 18, 1975, at approximately 2:40 p.m. Bernard Turner entered a branch of the Bowery Savings Bank located at One Penn Plaza, New York, New York. Turner, with one hand inside his pocket, approached Joanne Martinkovic, a bank teller, and said, "Don't panic. I got a gun. I'll start shooting. I don't care. You'll be responsible for everybody getting hurt. Put all your money in the bag." (Tr. 13-15).* As the teller proceeded to take $5,500 out of her cash drawer and place the money in a gray envelope, she pressed an internal alarm located in the cash drawer. (Tr. 60, 17; GX 1).

The bank guard, Robert Antonio, heard the alarm, observed that there was a disturbance at Miss Martinkovic's station and walked over to Turner who was standing at the teller's window. (Tr. 64-65). As Antonio and another bank guard, Andrew West, were approaching Martinkovic's station, Turner told Martinkovic, who was then holding the money, to "put it under the counter." (Tr. 19, 54, 69-70).

Following the apprehension of Turner by the two guards, Paul Pierre, the supervising teller, observed that $5,500 in cash had been placed in the gray envelope by Martinkovic. (Tr. 60).

B. The Defendant's Case

The defendant did not testify and offered no evidence.

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* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to Appellant's Brief.

C. Charge of the Court

The charge included a review of general principles of law concerning the function of the jury and the court, the assessment of the credibility of the witnesses, the nature of circumstantial evidence, the role of an indictment, the privilege of a defendant not to testify, reasonable doubt, presumption of innocence and a review of the Government's claims as to the facts. (Tr. 107-111, 117-119). Judge Bonsal also read the statute involved here, as well as the indictment, and then listed the following elements which the Government was required to prove beyond a reasonable doubt in order to convict appellant of attempted robbery:

> 1. That on or about December 18, 1975, the Bowery Saving Bank was a bank whose deposits were insured by the Federal Deposit Insurance Corporation.
>
> You remember the lawyers stipulated that in fact those deposits are insured, so you don't have to worry about that. Everybody agreed with that.
>
> 2. That on or about December 18, 1975, the defendant attempted to take money from the bank which was in the care of the bank; attempted to take money from the bank.
>
> 3. That the attempt to take money was from the person or presence of one or more persons other than the defendant.
>
> And here, as I recall the evidence, I am not sure there is a dispute here, the Government contends the attempt was to take money from Miss Martinkovic, the teller at the bank, who testified before you this morning.
>
> The fourth element the Government must prove beyond a reasonable doubt is that the defendant

> attempted to accomplish this bank robbery by force, violence or intimidation. (Tr. 113-114).
>
> * * * * *
>
> Finally, the final element which the Government must prove beyond a reasonable doubt is was the defendant here, Mr. Turner, acting knowingly, wilfully, unlawfully, in other words, that he had the criminal intent here to attempt to rob the bank. (Tr. 115).

The trial court also went on to define intimidation and intent. (Tr. 114-116).

ARGUMENT

POINT I

Defendant did not adequately preserve an objection to the court's charge on attempt.

Defendant's sole issue on appeal is that the court failed to charge the jury on the meaning of attempt and thereby denied him a fair trial. Although the point is pressed strenuously now, appellant failed to preserve the issue adequately in the court below. Prior to summation and charge, the Government submitted among its requess to charge a request which defined the term "attempt".* No written requests to charge were sub-

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* The Government's request to charge read as follows:

> With respect to the second element the Government must prove that the defendant *attempted* to take bank money from the Bowery Savings Bank teller. The Government is not required to prove that the defendant succeeded in actually getting the money.

[Footnote continued on following page]

mitted by appellant. Nevertheless, before charging the jury the court invited defense counsel's comments on the Government's requests to charge. It was only then that defense counsel said anything, expressing approval of the Government's request on attempt and seeking a charge that "the jury might consider whether they might be dealing with someone who had not even consummated an attempt." (Tr. 78-79).* The court indicated at that

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An attempt is an act done in part execution of an unlawful purpose and design; it is an act done with intent to commit a crime but failing to effect its commission. Preparation to commit a crime is not an attempt. The law considers as an attempt only those acts which not only tend to the commission of the crime, but which carry the project so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference resulting in a failure to consumate the crime.

Taken from charge of Judge Reeves in *United States* v. *Coplon*, aff'd, 185 F.2d 629, 633 (2d Cir. 1950).

* Defense counsel's comments in full were as follows:

Mr. Thau: As to this business of withdrawal, I would like a charge that the jury might consider whether they might be dealing with someone who had not even consummated an attempt.

The Court: No I don't think so.

Mr. Thau: If you look at the Government's Request No. 3, it says, correctly, "The law considers as an attempt only those acts which not only tend to the commission of a crime, but which carries the project so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for the timely interference resulting in a failure to consummate the crime."

In other words, he is now talking about someone like a guard coming on the scene and interrupting what had begun. Now, it's clear that the defendant uttered twice, "Put it under the counter," before the guards were on the scene. So if it can be regarded as an abandonment of his plan by him, it is not an abandonment caused by some fortuitous outside agency suddenly coming on the scene. It's a voluntary withdrawal, so to speak." (Tr. 79-80)

point that it was not inclined to so charge the jury. (Tr. 80). Following the court's instructions to the jury and pursuant to the procedure set forth in Rule 30, Fed. R. Crim. P., the judge gave the parties an opportunity to correct the charge. (Tr. 120-21). At that time, defense counsel offered no objection to the trial court's charge on attempt. He requested no amplification; no additions; and no corrections. Even when the Government requested an additional instruction that the Government was not required to prove that the defendant succeeded in getting any money, defense counsel remained mute. The court then charged the jury that it was immaterial whether the attempt succeeded, and again, the defense counsel said nothing. (Tr. 121-22).* Thus, having failed to make a proper objection before the trial court, defendant's present objection to the charge is reviewable only for plain error. Fed. R. Crim. P. 30, 52(b); *United States* v. *Pastore*, Dkt. No. 75-1428, slip. op. 4307, 4313 (2d Cir. June 21, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 461 (1975); *United States* v. *Rivera*, 513 F.2d 519, 526 & n.11 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974); *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States* v. *Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Indiviglio*, 352 F.2d

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* It is evident that the trial court was willing to correct or add to its charge. If the defense had wanted the court to correct itself there is no reason to believe that the judge would not have acquiesced and charged the jury as requested. Furthermore, defense counsel's failure to register any objection to the charge on attempt is some indication that no prejudice resulted from the charge given. *United States* v. *Nathan*, Dkt. No. 75-1421, slip op. 4201, 4208-09 (2d Cir. June 16, 1976).

276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Anticipating the Government's waiver argument, and attempting to avoid review for plain error only, appellant contends that objection to the charge on attempt was sufficiently preserved for review on appeal by virtue of defense counsel's oral request prior to delivery of the jury charge. Such an argument, however, contravenes the clear import of Rule 30 of the Federal Rules of Criminal Procedure, which requires an explicit objection to the charge, not merely an oral request prior to the delivery of the charge.*

In *United States* v. *Leach*, 427 F.2d 1107, 1113 & n.6 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970), the First Circuit specifically held that a defendant must register his objections to the charge after its delivery, even if a request was submitted and denied prior to the charge. In *United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948) (L. Hand, *C.J.*), *cert. denied*, 337 U.S. 931 (1949), a somewhat similar case to the instant one, this Court refused to review for error a charge where defendant failed to submit a specific request or to take exception to the charge, relying only on "discussion of [the] question before the charge was delivered." This Court stated that defendant's non-compliance with Rule 30 precluded the review for error which he sought on appeal. 171 F.2d at 624.

As ostensible authority for the proposition that submission of a request adequately preserves the issue for

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* Rule 30, Fed. R. Crim. P., provides in part:
"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

appeal, defendant relies on *United States* v. *Squires*, 440 F.2d 859, 862-63 (2d Cir. 1971). While in that case this Court noted that the trial court had "sufficient notice," the disputed instruction was, in any event, found to be plain error. Thus, defendant has produced no authority which recognizes anything less than plain error absent a specific objection following the court's charge. Indeed, any rule permitting preservation of objections to charges in the absence of such specific objection undermines the obvious policy underlying Rule 30, that is, to give the trial judge an opportunity to correct an erroneous charge to the jury prior to the jury's deliberations. *See United States* v. *Indiviglio*, *supra*, 352 F.2d at 280. Accordingly, having failed to alert Judge Bonsal to the purported need to supplement the charge on attempt which the court had delivered to the jury, to succeed in this Court appellant must show plain error in the charge which was given.

POINT II

The District Court charged the jury that attempted robbery had to be found and any failure to explain attempt was not error.

Even if the appellant had properly objected to the court's charge and the judge had declined any requested additions or changes, there would be no grounds for reversal in this case. Judge Bonsal correctly instructed the jury that in order to convict appellant of attempted robbery it must find beyond a reasonable doubt:

> That on or about December 18, 1975, the defendant attempted to take money from the bank which was in the care of the bank; attempted to take money from the bank. (Tr. 113).

Furthermore, the trial court stated again that the appellant is charged with an attempt to rob the bank and sufficiently advised the jury that "it is immaterial if that attempt succeeded because it is plain from the evidence that it did not." (Tr. 121-122). Thus, contrary to appellant's claim that the court failed to charge the jury on attempt, it is clear that the trial judge instructed the jury that it must find an attempt in order to convict the defendant.*

In arguing that the charge on attempt was inadequate, defendant relies on several cases in which the trial court did not merely fail to explicate a term, but rather omitted or misstated an element of the offense altogether. Each of those cases presented a far more substantial argument for the defendant than anything which this defendant raises here. *United States* v. *Singleton*, Dkt. No. 75-1114, slip. op. 1873, 1887 (2d Cir. February 13, 1976) (trial court failed to charge the jury that it must find the checks were stolen and made repeated references to stolen checks); *United States* v. *Howard*, 506 F.2d 1131, 1133-34 (2d Cir. 1974) (trial court failed to specify any of the particular elements to be proved); *United States* v. *Clark*, 475 F.2d 240, 248 (2d Cir. 1973) (trial court gave

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* To the extent that appellant suggests that the trial court took the element of attempt away from the jury's consideration, this claim cannot be supported by the record. In making this argument, appellant relies in part on a comment by Judge Bonsal after stating the third element of the crime, namely that the attempt to take money must have been *from the person or presence of another*. At that point the judge said that:

> "And here, as I recall the evidence, I am not sure there is a dispute here, the Government contends the attempt was to take money from Miss Martinkovic, the teller at the bank. . . ." (Tr. 113-114).

Not only was the comment *not* directed to the issue of attempt, as appellant appears to concede (Br. 13), but at most Judge Bonsal suggested that he was "not sure" about the lack of dispute on this issue.

improper instruction and inaccurately defined the elements of the offense); *United States* v. *Fields*, 446 F.2d 119, 120-21 (2d Cir. 1972) (trial court charged jury on wrong portion of statute, gave misleading instruction on an essential element of the crime, and misstated the object of the conspiracy charged in the indictment).

Likewise, in relying on *Mims* v. *United States*, 375 F.2d 135 (5th Cir. 1967), defendant is citing to this Court authority grounded on facts far more extreme than the facts of his own case. In *Mims*, where the attempted bank robbery was so incomplete that the defendants had not even entered the bank, the trial court did not merely fail to explain the difference between preparation and attempt; it affirmatively charged the jury that the evidence established the attempt as a matter of law. 375 F.2d at 147. The virtual directed verdict was the salient fact in *Mims* and Judge Bonsal delivered no such instruction in this case.*

Apart from defendant's inability to find authority requiring reversal for a mere failure to explicate "attempt," his position is even more seriously weakened by the incompatibility of his claims at trial and his claims on appeal. Here defendant argues that the charge was deficient because the jury was not instructed "to determine whether appellant's acts had proceeded sufficiently

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* *Kibbe* v. *Henderson*, Dkt. No. 75-2128, slip op. 3081 (2d Cir. April 8, 1976) is also cited by defendant and is also not analogous to this case. There the trial judge's failure to explain causation was believed by this Court to have removed the issue from the jury and to have possibly resulted in a conviction where an acquittal might otherwise have occurred on the "limited and singular facts" of that case, (slip op. at 3089, 3093). Also, as the Court noted in that opinion, causation is a complex legal concept which jurors may not understand without instruction. *Id.* at 3091. By contrast, attempt is a term far more readily within the parlance and comprehension of laymen.

to constitute an attempt." (Br. 10). However, this was not a case where any fine delineation between preparation and attempt was in issue. Indeed, at trial defense counsel consistently argued not that there was mere preparation, but that the defendant withdrew from the attempt.* Given defendant's arrival at the bank, the demand for money and the explicit threat to the teller resulting in the actual production of money, an argument that there was mere preparation would have been absurd and defense counsel wisely chose not to advance it.

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* In requesting a charge on attempt counsel said:

> "As to this business of withdrawal, I would like a charge that the jury might consider whether they might be dealing with someone who had not even consummated an attempt." (Tr. 79).

In moving for a judgment of acquittal, he advanced the following argument:

> "[W]e are dealing here perhaps with not even an attempt based on the evidence, but a half-attempt and then a withdrawal or discontinuance of the attempt by the defendant." (Tr. 76).

Finally, in summation he raised the following issue:

* * * * *

> "So Mr. Levine is understandably annoyed by that 'put it under the counter' directive, repeated twice, because it suggests either that the fellow never wanted the money in the first place, or else that after two seconds of foolishness, that perhaps we can get money from a bank with some kind of impunity, he thought better of it. Who hasn't, in a moment of stress, thought, 'Oh, my God, if I could manage to borrow a few bucks from the First National City Bank'? So his explanation for it is the cops were right behind him. The cops, in the person of Antonio and West. The bank guards. That is not so. If you have any doubts concerning this, I beseech you to ask the Court to have the evidence on that point reread. You will remember that when Antonio said that he heard the words 'Keep it low, keep it low,' he was, I think he said, about five or six feet behind the defendant. It is quite a distance." (Tr. 99-100).

Instead, seizing on the defendant's instruction to the teller to "put the money under the counter," defense counsel argued that a withdrawal from the attempted robbery had occurred at that point. The Government's view is that the defendant's instruction was given for the purpose of concealing the robbery from the approaching bank guards; but, of course, defense counsel's inventive version of the same incident was an argument which he was entitled to put before the jury, as he did. (Tr. 99-100).

However, whatever his right to paint this sympathetic version of this event in arguing to the jury, defense counsel was not entitled to a charge from the court that if the defense version were believed, withdrawal at that point of the robbery would vitiate the attempt and require acquittal. Abandonment of an attempt that has proceeded beyond preparation does not create a defense. *United States* v. *Bussey*, 507 F.2d 1096, 1098 (9th Cir. 1974).* Judge Bonsal correctly decided that the jury should not be charged that an attempt was not adequately proved if there had been the withdrawal that defense counsel posited.**

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* But see *ALI Model Penal Code* § 5.01(4) (1962), which permits a defendant to raise "an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Commentators instrumental in the drafting of the Code recommended adoption of this provision, but noted at the time that "[w]hether voluntary abandonments constitute a defense to an attempt charge is far from clear, there being few decisions squarely facing the issue." Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 571, 615 (1961). *United States* v. *Bussey*, *supra*, appears to be the only federal court decision on point and explicitly rejects the defense.

** To some extent it is difficult to state precisely the request that the district court rejected in this case. While consistently referring to a voluntary withdrawal, defense counsel muddied the issue by urging as support for that defense the Government's

[Footnote continued on following page]

In conclusion, the Government's evidence in this case, if believed by the jury, proved an attempted robbery that fell short of actual robbery only because of its lack of success. Although the better practice may well have been to define all pertinent terms used in the charge, on these facts and in light of the defense arguments, a charge explaining the difference between attempt and preparation would have been wholly beside the point. Perhaps defense counsel's failure to object to the court's omission of the delineation between withdrawal and attempt represented his implicit recognition that the issues at trial, as he had presented them, would not be determined by that point of law. In any event, Judge Bonsal did not commit error by failing to provide that explanation for the jury in this case and if any error were found by this Court, it must be characterized as harmless in view of the overwhelming evidence of guilt, the sufficiency of which is not even contested by the defendant.

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request to charge which had no connection to the issue of voluntary withdrawal. (Tr. 79-80) On appeal the claimed error is repeatedly assigned to the court's failure to explain how far the defendant's acts had to proceed before an attempt was consummated, (Br. 10, 12, 15), again an issue unrelated to voluntary withdrawal. All this points to the appropriateness of finding that the objection below was inadequately raised and failed to give the district court sufficient notice of the language which defense counsel sought to have included in the charge.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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